The Review Officer's Response to the Advisory Committee Report on the Nova Scotia Freedom of Information and Protection of Privacy Act - October 30, 2003

The Review Office commends the Chair of the Committee and its members for agreeing to take on a difficult task. The Review Office welcomes such recommendations as: a reduction of fees; the recognition of the importance of the role of FOIPOP Administrators; and mandating a public education role for the Review Office. The Review Office still holds the view that the $25.00 application fee is a deterrent to many private citizens. Only one other province has an application fee at that level and the average income of Alberta residents is significantly higher than that in Nova Scotia.

The Office is disappointed that the Committee, while recognizing that issues of personal privacy are becoming increasingly important to all Canadians, chose not to thoroughly examine and recommend on personal privacy matters. We understand the issue's complexity, but we also see the need for government to move quickly.

Many of the Committee's recommendations, in our view, will be very helpful. We have isolated some recommendations for comment. Unfortunately for purposes of substantial comment, we find there is insufficient analysis or reasoning attached to the recommendations.

Recommendation 21:

> **The Government of Nova Scotia consider establishing a Committee to specifically review pertinent aspects of personal and business privacy once the federal legislation is implemented and provincial issues become more obvious.**

This Office believes this examination is needed immediately. The federal private sector privacy act, the Personal Information Protection and Electronic Documents Act (PIPEDA) will come into force in Nova Scotia on January 1, 2004. Only "substantially similar" provincial privacy legislation can replace PIPEDA.

The Review Office recommends the Government establish a committee as soon as possible to consider home-grown personal privacy protection legislation for the provincial private sector; for Nova Scotians who are not employees of companies that fall under PIPEDA; and for the health information sector.

However, providing the Review Officer with the mandate to investigate privacy complaints brought under the provincial Freedom of Information and Protection of Privacy Act (FOIPOP Act) should not be delayed. This can be done without interfering in any way with planning for provincial private sector legislation. We

are disappointed that the Committee did not address in a meaningful way our recommendation or anyone else's on this issue.

With all due respect to the legislature, it may not have understood that when it passed the Act it provided independent oversight only over the access side. One of the main purposes of the Act, as set out in Section 2, is to *"protect the privacy of individuals with respect to personal information about themselves held by public bodies"*. Another purpose is to ensure that public bodies are fully accountable to the public by *"preventing the unauthorized collection, use or disclosure of personal information by public bodies"*. The rules for the collection and protection of personal information are set out in sections 24 to 31.

There is no oversight over these sections. Without some type of review or oversight provision, these sections and the lofty purpose behind them are meaningless. The Act, in effect, lays down rules for the collection, protection, retention, use and disclosure of personal information, but if a public body chooses to ignore these rules, there is nothing an aggrieved individual can do. There is no recourse.

Section 32(1) permits a citizen to ask for a review of a decision by a public body not to correct that individual's personal information held in a public body's files. But there is no complaint or review mechanism if a public body violates the rules for the collection, production, use and disclosure of that individual's personal information..... and no penalties.

At the moment, Nova Scotians can complain to the federal Privacy Commissioner if they feel their personal privacy has been invaded by a federal public body. Come January 1, 2004, under PIPEDA, Nova Scotians will have the right to complain to the federal Privacy Commissioner if they feel they have a privacy grievance with the private sector. However, there is no avenue for Nova Scotians who wish to issue a privacy complaint against a provincial public body.

The British Columbia access and privacy Act, which we understand was a model used for the FOIPOP Act, gives the Commissioner the power to receive complaints and conduct investigations and audits to ensure compliance with any and all provisions of their Act, which includes the protection of personal privacy sections.

There is a void in our legislation on privacy protection. We urge the Government to fill this void so that Nova

Scotians will have rights similar to individuals in British Columbia and other provinces with respect to the protection of their personal information held by provincial public bodies.

Recommendation 22:

> **The Government consider appointing a separate, independent arbitrator with authority to investigate privacy complaints, outside the scope of the FOIPOP Act.**

There was no discussion of this recommendation in the Committee's Report. Consequently it is unclear what its intentions were. At the moment individuals in Nova Scotia cannot make privacy complaints "outside the scope of the FOIPOP Act".

The Committee may be recommending that a parallel review office should be set up to investigate privacy complaints under other privacy legislation. But there is none. If the Government were to introduce other privacy legislation, i.e. private sector and personal health information, which I strongly recommend they do, this legislation would, if the Committee's recommendation were adopted, contain independent oversight provisions to handle complaints, while the FOIPOP Act would not. Whatever government and the legislature may do in the future, the FOIPOP Act is here, and without independent oversight provisions to investigate privacy complaints.

If the government were to agree to the recommendation for two review offices, it would constitute a departure from the practice in every jurisdiction in the country except for Ottawa, where debate about putting access and privacy under one Commission and one Commissioner appears to be never ending. In fact, just a few weeks ago, the federal Information Commissioner produced a position paper on the matter: *Oversight Models under the Federal Access and Privacy Acts: Single- Commissioner vs. Dual-Commissioners.*

Access and privacy rights are not contradictory but complementary and this explains why they appear together in legislation in all of the provinces and territories. You cannot have access legislation without built-in personal privacy protection provisions. Other provincial privacy Acts may be legislated, i.e. personal health information and privacy protection in the private sector, but they will all be built on the same principles that govern the personal privacy sections of the FOIPOP Act.

Even in provinces with "substantially similar" private sector legislation or health information protection legislation, or both (British Columbia, Alberta, Manitoba and Quebec), independent oversight is provided by

a single Information and Privacy Commissioner. (Manitoba combines the role of Commissioner and Ombudsman. The Ombudsman oversees the Freedom of Information and Protection of Privacy Act as well as the Personal Health Information Protection Act).

As noted above the debate about dual or single commissioner for access and privacy has been resumed in Ottawa. Some history may be helpful. When the federal Access to Information Act and the Privacy Act were passed by Parliament in 1982, they were combined in bill C-43. The Minister who introduced the bill said at the time: "Combining access to information and privacy legislation in one bill has permitted the complete integration of these two complementary types of legislation". [House of Commons debates, vol. XVI, 1st Session, 32nd Parliament at p. 853 (June 28, 1982)]

Within the federal government, both laws are administered by one coordinator and one Minister is responsible for the implementation and administration of the two laws.

The two Commissioners' offices are treated as a single department for purposes of the Financial Administration Act. Until a few years ago the Commissions shared a common management branch.

The Standing (Commons) Committee on Justice and Solicitor General favoured two commissioners. So did a former Information Commissioner although he conceded the single commissioner approach in the provinces and territories was working well. (The interim Privacy Commissioner of Canada supports the dual-commissioner model to retain a high privacy profile and because "it would not be cost-effective to undo what has been done").

The Conservative government in office in the 80's disagreed with the standing committee and expressed the view that merging the two commissions would encourage a balancing of interests between access and privacy.

The Supreme Court of Canada also addressed the issue. *Dagg v. Minister of Finance* made it clear that the access and privacy laws are complementary. In *Information Commissioner v. The Commission of the RCMP,* the Court called the Access and Privacy Acts "a seamless code, with complementary provisions..." [*Information Commissioner v. The Commissioner of the RCMP,* S.C.C., March 6, 2003, at paragraphs 21 and 22]

In *Joan Van Den Bergh v. National Research Council Canada* (September 29, 2003) the two Acts were defined as "two sides of a single coin. Together they set out the rules governing disclosure and protection of information held by the federal government".

The federal Information Commissioner, commenting on the views of the Interim Privacy Commissioner, said "the available evidence does not show that privacy gets 'short changed' where access and privacy are overseen by the same Commissioners." He refers specifically to three of the most influential privacy advocates in the country, the Ontario Commissioner and the former British Columbia and Quebec Commissioners whose "tenacity in the service of privacy rights has been in no way diluted by virtue of their role in ensuring that public access rights are respected."

The federal Information Commissioner concludes, in his position paper:

> "The single-agency model of oversight of access and privacy rights is a proven approach. On the other hand, the dual-agency, federal model, has given rise to real problems, among them: conflicting advice to Parliament...; emphasis on single values rather than a balanced consideration of multiple values; an adversarial relationship between single-issue commissioners and public officials...."

We urge the Government not to accept the recommendation for two reviews offices. Such an arrangement would raise the real possibility of the review officers supporting conflicting views, an event that arose on the federal level.

The FOIPOP Review Office has the expertise and the resources to investigate privacy complaints and comment on privacy issues. More resources would be required if the legislature passes private sector and health information legislation, but with a base to build on, the expense of this to the public purse would be much less than the cost of setting up a whole new agency.

Recommendation 2:

> **The Act be amended to permit Administrators to decline to process an application they deem to be repetitious or incomprehensible. The Administrator must advise the applicant of the decision, in writing, within 30 days of receipt of the application. The**

right of the applicant to have the decision reviewed by the Review Officer, should remain.

The Committee uses the term "frivolous" and "vexatious" in its introduction to this recommendation but uses the words "repetitious" and "incomprehensible" in its recommendation. While repeated applications on the same matter from the same applicant can fairly be described as "frivolous", an "incomprehensible" application may not be. Section 7(1)(a) of the Act requires public bodies to make "every reasonable effort" to assist applicants. This would certainly include an effort by the FOIPOP Administrator to clear up any confusion in the wording of the application.

This Office suggests that the word "incomprehensible" be omitted. It is noted it was not used by the FOIPOP Administrators in their submission to the Committee.

Although a review of the decision is essential, it remains our view that, without intending any reflection on the integrity of the Administrators, a decision to refuse an individual the basic right to make an application for access, should rest with the independent Review Officer.

Recommendation 8:

The Review Officer be given the power, where there are reasonable grounds to believe a public body has not provided the Review Office with all responsive records, to investigate and audit a public body.

Section 38(1)(b) already provides the Review Officer with this power. Our recommendation to the Committee related to granting the power to the Review Officer to audit and investigate a public body outside the review process.

Recommendation 30:

Section 12 be revised to reflect that such records should be exempted, if they would reveal information, provided in confidence, from another government.

This exemption is a discretionary exemption, not a mandatory one. Any amendments to this section should maintain its discretionary nature. A careful reading of the FOIPOP Administrators' submission, indicates that while they were asking for certain wording to be changed, it was not their intention to recommend removing the exercise of discretion this section permits.

Recommendation 7:

The Review Officer provide in each review full reasons for the decision.

Again we have been unable to find this recommendation in any of the submissions the Committee received. In the absence of any reason for the recommendation we can only assume that the Committee approves the approach we take in our review reports and wants to ensure that future review officers follow the same practice.

Office of the Legislature

The Committee Report is silent on the recommendation of the Review Officer that his Office become an office of the legislature following the practice in all other jurisdictions in the country. We are ignorant of the reasons for the reluctance of the government to follow this path and by the Committee's decision not to agree to or comment or our recommendation.

As an arm's length independent agency the Review Office must be accountable to the public through its legislature. We frequently have to assure the public that although the Minister of Justice administers the Act, the Review Officer does not report to the Department.

We would welcome a requirement to appear before legislative committees to give an accounting of the office's activities and expenses. It would also reinforce the Office's independence in the public's eyes and enhance respect for the Office.

Dated at Halifax, Nova Scotia this 30th day of October, 2003.

_____

Darce Fardy, Review Officer